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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-289

RONALD BRASEL,
Petitioner,

vs.

STATE OF MISSOURI,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT
OF MISSOURI

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINION BELOW

The opinion of the Supreme Court of Missouri which petitioner attacks herein is reported at 538 S.W.2d 325 (Mo. Banc 1976) and is styled, State of Missouri, respondent v. Ronald Eugene Brasel, appellant, No. 59,243.

JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to Title 28 U.S.C. §1257(c), which provides that this Court may review the final judgment of the highest court of the state by writ of certiorari where any title, right, privilege, or immunity is specially set up or claimed under the Constitution of the United States.

QUESTION PRESENTED

1. Whether, under the facts of this particular case, the state had probable cause to arrest the appellant for the unlawful possession of controlled substances?

STATEMENT OF FACTS

[*For purposes of this statement of facts, transcript references are to the transcript of the hearing on the petitioner's motion to suppress which was filed prior to trial.*]

The petitioner, Ronald Eugene Brasel, was found guilty on both grounds of a two-count indictment for unlawful possession of controlled substances in violation of §195.-017, RSMo 1969. Punishment was assessed by the trial court at four years in the custody of the Missouri Department of Corrections on Count I and four years on Count II, the sentences to run concurrently. Execution of this sentence was suspended, and the petitioner was placed on probation for five years.

The facts underlying the petitioner's conviction may be summarized as follows:

> The case was tried to a jury in the Circuit Court of St. Louis County, Missouri, before the Hon. Paul E. Corning, Jr. At the close of all the evidence, the jury returned a verdict of guilty on both counts, but advised the judge that it was unable to agree on the punishment and, in accordance with the Court's Instruction No. 14, asked that the Court assess the punishment. Petitioner's motion for new trial was overruled, and Petitioner was sentenced to four (4) years in the Missouri Department of Corrections on Count

I and a concurrent term of four (4) years on Count II. Execution of the sentence was stayed and petitioner was placed on probation for five (5) years.

The trial judge overruled petitioner's motion to suppress certain evidence, which decision is challenged by petitioner on this petition. The testimony at the motion to suppress was as follows:

On April 10, 1972, the petitioner, using the name of "Ronald Bradley", registered at the Inn America Motel located in St. Louis County. Petitioner paid one week's lodging in advance (from April 10-17, 1972), and then on April 17th, he paid for the same room (Room 233), through 12:00 noon on Tuesday, April 25, 1972 (Tr. 50).

On Monday, April 24, 1972, Rose Payne, a maid, used her key to open the door to petitioner's room, Room 233 (Tr. 15). Mrs. Payne testified that she had seen a "do not disturb" sign on petitioner's door, Saturday, April 22, 1972, and Sunday, April 23, 1972 (Tr. 12). Mrs. Payne saw the same sign on Monday, April 24, 1972, but she opened the door, "because I felt like the guest checked out and didn't take the sign off the door" (Tr. 15). Mrs. Payne, upon opening the door to petitioner's room, saw a substantial quantity of pills on the floor and dresser of appellant's room (Tr. 15, 16). Mrs. Payne was able to see these pills from the motel hallway (Tr. 17). Mrs. Payne closed the door to Room 233 and called the housekeeper, Jerre Sadler to report her observations to the housekeeper. Mrs. Sadler met Mrs. Payne outside Room 233. Mrs. Payne unlocked the door to petitioner's room to allow Mrs. Sadler to look into the room (Tr. 19). Mrs. Sadler observed the

pills on the floor and dresser after the door was opened to petitioner's room (Tr. 19).

After closing the door to petitioner's room, Mrs. Sadler reported her observations to the motel manager, Ted Armstrong (Tr. 36). Mr. Armstrong, with Mrs. Sadler present, entered Room 233. Mr. Armstrong testified that they remained in the room ten or fifteen minutes and did not disturb anything in the room (Tr. 58). Mr. Armstrong "noted" that most of the bottles that contained the pills, had "federal warrants" on them (Tr. 64). Mr. Armstrong and Mrs. Sadler closed the door when leaving petitioner's room. Mr. Armstrong proceeded to the front of the motel to call the St. Louis County Police Department (Tr. 58). St. Louis County Narcotics officers arrived approximately thirty minutes after the manager called the police (Tr. 106).

Ted Zinselmeier, one of the St. Louis County policemen responding to the manager's call, testified they arrived at the Inn America at approximately 3:30 p.m. April 24, 1972 (Tr. 105). When they arrived at the motel, Armstrong showed the petitioner's motel registration to the policemen (Tr. 107). In order to ascertain who the registered owner of the vehicle shown on the motel registration was, the policemen went to the manager's office to telephone the St. Louis County Police Headquarters. They learned that Ronald Brasel of St. Louis County, was the registered owner of the vehicle, and not Ronald Bradley of Kansas City (Tr. 108-109). The motel manager advised the policemen that he had observed large amounts of drugs in petitioner's room (Tr. 171).

The motel manager subsequently opened the door to petitioner's room, and the policemen entered the

room and observed several bags and bottles of pills (Tr. 112). Officer Zinselmeier estimated that there were approximately 300,000 pills in petitioner's room (Tr. 113).

The policemen stayed approximately fifteen minutes in petitioner's room (Tr. 114). Mr. Armstrong allowed the policemen to "stake-out" petitioner's room by waiting in an adjoining room, Room 231.

The policemen also interviewed the housekeeper, Jerre Sadler, prior to petitioner's return, as she had also seen the substantial quantity of drugs in petitioner's room (Tr. 170).

Subsequently, the petitioner was seen driving into the motel parking lot and thereafter was viewed by the officers carrying a dark-colored attache case and several pieces of clothing. After hearing the petitioner enter Room 233, Officer Zinselmeier knocked on the door of Room 233 (Tr. 123). Petitioner opened the door, whereupon Officer Zinselmeier identified himself and displayed his badge and credentials (Tr. 124). After Zinselmeier identified himself, he asked petitioner if they could enter the room. Zinselmeier testified that petitioner said, "yes come in" (Tr. 137). The petitioner then stepped back in order to permit the policemen to walk into the room (Tr. 125). Inside the room, Zinselmeier asked petitioner for identification. The petitioner showed Zinselmeier a driver's license in the name of Ronald Brasel (Tr. 125). Officer Zinselmeier then placed petitioner under arrest for suspicion of unlawful possession of a controlled substance (Tr. 126). Officer Zinselmeier then searched petitioner's person and removed 162 red-colored capsules from petitioner's right trouser pocket (Tr. 127, 128). These capsules were later

analyzed as secobarbital (Tr. 128). Officer Zinselmeier then searched the black attache case that petitioner brought into the room and, discovered thirty-one capsules of what was later analyzed as amphetamines (Tr. 128). After the search of petitioner's person, petitioner was handcuffed and advised of his constitutional rights (per Miranda) (Tr. 128). Zinselmeier testified that the reason for searching the briefcase was primarily for protection, as Zinselmeier thought that the briefcase might contain a gun or bomb (Tr. 150). The items removed from appellant's pants pocket, 162 capsules of secobarbital, were the items for which appellant was charged and convicted in Count I; the items for which petitioner was charged and convicted in Count II, 31 capsules of amphetamines, were taken from the black attache case petitioner brought into his room, during Zinselmeier's search for weapons.

Petitioner made a statement in the motel room that these pills were received from a man by the name of Jerry earlier that evening at a parking lot adjacent to Perkins Pancake House (Tr. 130).

Subsequently, at police headquarters, petitioner made a similar statement that was recorded by videotape, after he was apprised again of his constitutional rights (per Miranda) (Tr. 141).

ARGUMENT

The issue presented by this petition is not a legal issue in any but the broadest sense. Rather, it is solely a factual question: Did the police have probable cause to arrest the petitioner for possession of controlled substances? To resolve this issue we must look to the quantum and the quality of the information available to the police at the time of the petitioner's arrest. The law has gone beyond the suggestion of John Marshall that near suspicion may amount to probable cause. *Locke* v. *United States*, 7 Cranch 339, 348, 3 L.Ed. 394 (1813). Probable cause now exists only where the "facts and circumstances within the officer's knowledge and of which they have reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed. *Brinegar* v. *United States*, 338 U.S. 160, 175-176, 69 S.Ct. 1302, 93 L.Ed. 1879 (1949).

Of course, in terms of the quantum of the evidence, the amount of information necessary to equal probable cause is not absolute, but rather is to be measured in accordance with the facts of each case. *Wong Sun* v. *United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). In the instant case, the motel manager phoned the police at approximately 3:00 p.m. that he had observed quantities of drugs in the petitioner's room; the manager testified that he noted that these drugs had federal warrants on them. The presence of federal warrants indicated that the substances were in the nature of controlled substances. (See §195.100, RSMo 1969, dealing with the requisite labeling requirements.) Subject to certain limited exceptions, only two of which might apply here, it is unlawful in Missouri for any person to possess controlled substances.

§195.020, RSMo 1969. Possession is not prohibited where the person possesses the drugs pursuant to a prescription, §195.240(7), RSMo 1969. Persons licensed under certain chapters of the Missouri statutes may also legally possess such drugs in the "usual course of business or in the performance of their official duties," §195.240(1). One licensing chapter referred to in this section is Chapter 338, RSMo 1969, which provides for the licensing of pharmacists.

The presence of approximately 300,000 pills in the petitioner's room would make unlikely an impression that the drugs were possessed by the occupant of the room pursuant to a prescription. The information received from the motel manager also did not suggest that the occupant of the room was licensed to possess the drugs. The fact that Brasel was a pharmacist was not discovered until some time after the 3:30 p.m. entry by the police. Even the knowledge of Brasel's status would not necessarily dissolve the probable cause because the authorization for pharmacists to possess controlled substances is limited to the situation of "in the ordinary course of business." Possession of such substantial quantities of drugs in a motel room by a man registered under an assumed name arguably does not suggest the "ordinary course of business." Judged against the standard of sufficiency "to warrant a prudent man in believing that [petitioner] had committed or was committing an offense", *Beck* v. *Ohio*, 379 U.S. 89, 91, 85 S.Ct. 223, 225, 13 L.Ed.2d 142 (1964), the information obtained from the motel manager was sufficient to constitute probable cause. The reported information suggested a violation of the general prohibition against possession of controlled substances; the information did not suggest that the petitioner's conduct fell within the very limited exceptions to that prohibition.

In addition to an examination of the quantum of the evidence, it is also important to assess the quality of the information relied upon by the police. The "quality" of the information, as that term is used here, relates to the manner in which the evidence was discovered and the nature of the source from which the information was received. This Court has suggested that the reasonableness or unreasonableness of a search and seizure must be evaluated in light of the defendant's "reasonable expectation of privacy," *Katz* v. *United States*, 389 U.S. 347, 360, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) (Mr. Justice Harlan's concurrence), and that a motel room can be protected by the Fourth Amendment as well as a home or an office, *Hoffa* v. *United States*, 385 U.S. 293, 301, 87 S.Ct. 408, 17 L.Ed.2d 374 (1966); *United States* v. *Jeffers*, 342 U.S. 48, 72 S.Ct. 93, 96 L.Ed. 59 (1951). While this notion of the reasonable expectation of privacy may serve to invalidate the 3:30 p.m. entry by the police, it may not shield the petitioner from the entries by the motel personnel. The protections of the Fourth Amendment do not apply to the actions of private individuals, even if the private actions amounted to trespass, *Burdeau* v. *McDowell*, 256 U.S. 465, 467, 41 S.Ct. 574, 65 L.Ed. 1048 (1921); *United States* v. *McGuire*, 381 F.2d 306, 313 n. 5 (2nd Cir. 1967), as long as the private individual is not acting pursuant to a request by the police, *State* v. *Hunt*, 280 S.W.2d 37 (Mo. 1955); *People* v. *Fierro*, 46 Cal.Rptr. 132, 134 (1965). Testimony in the present case gives no indication of connivance with the police prior to the investigation of the room by the motel personnel. The police did not have Brasel under investigation prior to the call from Mr. Armstrong and had had no prior contact with Armstrong. Armstrong, the motel manager, could not consent to the police entry of the defendant's room, *Stoner* v. *California*, 376 U.S. 483, 84 S.Ct. 889, 11 L.Ed.2d 856

(1964); *United States* v. *Matlock*, 415 U.S. 164, 94 S.Ct. 988, 39 L.Ed.2d 242 (1974), but previously acquired information could be relayed to the police.

Having received the information from the motel personnel, the police could utilize such information to amount to probable cause. In state court, the petitioner cited *Wong Sun* v. *United States, supra,* at 371 U.S. 471 (1963) as creating a "fruit of the poisonous tree doctrine" under which evidence seized pursuant to an illegal search should be excluded. The evidence to be excluded is said to be tainted. *Wong Sun* itself and the cases following, however, express an important limitation on this exclusionary rule in terms of the "independent source" doctrine, *James* v. *United States,* 418 F.2d 1150 (D.C. Cir. 1969); *Peterson* v. *United States,* 411 F.2d 1074, 1078-1079 (8th Cir. 1969); *Silverthorne Lumber Co.* v. *United States,* 251 U.S. 385, 392, 40 S.Ct. 182, 64 L.Ed. 319 (1920). The test for an "independent source" is said to be whether "evidence to which the instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint," *Wong Sun* v. *United States, supra* at 487. In the present case, the discovery of the drugs in the petitioner's room upon which the probable cause is based derived from prior unsolicited observations by private persons. Under *Wong Sun,* information should not be admitted which derived from the 3:30 p.m. entry by the police, if that entry was illegal, but no such information need be relied upon to establish probable cause. As said above, the information yielding probable cause received by the police was from an unsolicited observation made by private persons without any police connivance, and was, therefore, proper. So, too, the police also could deem such information coming from an informant to be reliable in the absence of exceptional circumstances. *Smith* v. *Swenson,* 328 F.Supp. 747, 752 (W.D. Mo. 1971).

Thus, the 3:30 p.m. entry by police, although improper, did not *per se* invalidate the petitioner's arrest. The record does not show any additional information deriving from the 3:30 p.m. entry by the police. The fallacy of the petitioner's argument in state court was that it focused on the question of the legality of this 3:30 p.m. entry as if that entry was the only source of information. To the contrary, at 3:00 p.m., after talking to the motel manager, the police had probable cause to suspect the commission of a felony, *i.e.,* the possession of controlled substances. Armed with such probable cause, the five policemen retired to the adjoining room to await the return of the occupant of Room 233.

An examination of the record also reveals another way to justify the arrest of the petitioner. For it is clear that the arrest of Brasel at 10:00 p.m. and the seizure of the drugs might also be legitimized by the consent of the petitioner to the entry by the police. *Coolidge* v. *New Hampshire,* 403 U.S. 443, 514-515, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971), recognizes an exception to the general requirement of a warrant even for a search where there is consent by the defendant. It has been held that a finding of consent need not be premised on a showing that the defendant was aware of his right to refuse, *Schneckloth* v. *Bustamonte,* 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). A finding of voluntary consent to search must, however, be based on an evaluation of all of the circumstances. While there were five police officers and the motel manager standing outside the petitioner's room requesting entry, there is nothing to indicate that the petitioner merely acquiesced to lawful authority, see *Bumper* v. *North Carolina,* 391 U.S. 543, 88 S.Ct. 1788,

20 L.Ed.2d 797 (1968). The transcripts of the proceedings indicate that the petitioner was asked permission to enter the motel room and that he consented to the entry.

Having validly entered the motel room pursuant to the consent of the petitioner, the police acquired additional probable cause to arrest the petitioner. This additional probable cause resulted from the observation of large quantities of drugs scattered about the room. The testimony indicates that the police were able to view some of the drugs from their position in the entranceway because not all of the drugs were in bags. The general rule of "plain view" allows the police to take notice of these objects if the observer has the right to be in the position that he was in.

It is clear, therefore, that the police had probable cause to arrest the petitioner based on (1) their conversations with the motel manager and motel personnel; (2) their independent investigation which revealed, *inter alia*, that the petitioner was a pharmacist registered under an assumed name; and (3) their observations of the petitioner's motel room at the time the petitioner admitted them into the room.

Consequently, the petitioner's petition for writ of certiorari should be denied.

CONCLUSION

For the above reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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